Supreme Court, U. S.
FILED
JUL 2 1980
MICHAEL RODAK, JR., CLERK

No. 79-1612

In the Supreme Court

OF THE

United States

OCTOBER TERM 1979

AMERICAN BROADCASTING COMPANIES, INC., et al.,
Petitioners,

vs.

VEGOD CORPORATION,
WESTERN INSTITUTE OF RETAILING, INC.,
Respondents.

Petition for a Writ of Certiorari
to the
Supreme Court of the State of California

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

LILLICK MCHOSE &
CHARLES
ROBERT KAVANAUGH
Two Embarcadero Center
26th Floor
San Francisco, CA 94111
Telephone: (415) 421-4600
Of Counsel

TOLPEGIN, IMAI &
TADLOCK
ANDRE V. TOLPEGIN
235 Montgomery Street,
Suite 950
San Francisco, CA 94104
Telephone: (415) 989-8676
Of Counsel

ROBERT FREMLIN
Two Embarcadero Center
26th Floor
San Francisco, CA 94111
Telephone: (415) 421-4600
Attorney for
Petitioners

BOWNE-PERNAU WALSH • 1045 SANSOME ST. • S.F., CA 94111 • (415) 981-7882

SUBJECT INDEX

		Page
1.	Respondents' Ground for Filing This Supplemental Brief	1
2.	Supplementary Reason for Granting the Writ	2
3.	Conclusion	5

TABLE OF AUTHORITIES CITED

Cases

New York Times Co. v. Sullivan, 376 U.S. 254 (1964).... 2, 4

Steaks Unlimited, Inc. v. Deaner, 468 F. Supp. 779 (W.D. Pa. 1979) 3

Steaks Unlimited, Inc. v. Deaner, 6 Med. L. Rep. 1129 (U.S.C.A. 3d Cir. 1980) 2, 4, 5

Rules

Rules of the Supreme Court of the United States:

Rule 17.1(b) 2

Rule 22.6 2

No. 79-1612

In the Supreme Court

OF THE

United States

OCTOBER TERM 1979

AMERICAN BROADCASTING COMPANIES, INC., et al.,
Petitioners,

VS.

VEGOD CORPORATION,
WESTERN INSTITUTE OF RETAILING, INC.,
Respondents.

Petition for a Writ of Certiorari
to the
Supreme Court of the State of California

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

1. Respondents' Ground for Filing This Supplemental Brief

On April 15, 1980, petitioners American Broadcasting Companies, Inc., Christine Lund, Better Business Bureau of San Francisco, Ltd., Charles R. Thurber and Louis Keefer filed with this Court and served their petition for writ of certiorari to the Supreme Court of the State of California. The underlying action is one for defamation in which the California Supreme Court reversed the trial court and the court of appeal and held that respondent corporations were not public figures. The first question in the petition for writ of certiorari is as follows:

> Did the California Supreme Court err in denying a news broadcaster who reported Better Business Bureau allegations of fraudulent merchandising practices the protection of the actual malice standard of *New York Times Co. v. Sullivan* in a defamation suit where the reason for denying the standard's protection was that "criticism of commercial conduct does not merit the special protection of the actual malice test"?

Petitioners file this supplemental brief pursuant to U.S. Supreme Court Rule 22.6 in order to direct the Court's attention to *Steaks Unlimited, Inc. v. Deaner*, 6 Med. L. Rep. 1129 (U.S.C.A. 3d Cir. 1980), which was decided by the U.S. Court of Appeals for the Third Circuit subsequent to the filing of the petition. The holding in *Steaks Unlimited* cannot be reconciled with that of the California Supreme Court in the case at bar. Hence, a review of this case on writ of certiorari is now appropriate for the additional ground set forth in Supreme Court Rule 17.1(b):

> When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.

2. Supplementary Reason for Granting the Writ

The U.S. Court of Appeals for the Third Circuit and the California Supreme Court have decided oppositely the federal question of whether, in a defamation action, criticism of commercial conduct merits the special protection of the actual malice standard of *New York Times Co. v. Sullivan*

Like the case presently before this Court, *Steaks Unlimited, Inc. v. Deaner* is a defamation action arising out of

a televised news report critical of the plaintiff corporation's merchandising practices. Plaintiff Steaks Unlimited, Inc., conducted a four-day sale of meat at several department stores. The meat was United States Department of Agriculture (USDA) inspected, ungraded, frozen, tenderized, boxed beef, approximately equivalent to USDA commercial grade. Defendant Donna Deaner, a reporter and consumer affairs editor for defendant television station WTAE-TV, investigated plaintiff's advertising and sales operations and televised a highly critical report on WTAE's evening news program. Its gist was that consumer's were being misled into believing they were purchasing a better grade of beef at a lower cost per pound.

The United States District Court for the Western District of Pennsylvania granted defendants' motion for summary judgment after first determining that plaintiff Steaks Unlimited, Inc., was a public figure for purposes of its defamation action and, therefore, bore the burden of proving actual malice. *Steaks Unlimited, Inc. v. Deaner*, 468 F. Supp. 779 (W.D. Pa. 1979). On appeal, the U.S. Court of Appeals for the Third Circuit affirmed the judgment and held the district court had not erred in its classification of the plaintiff. In so doing the court of appeals determined specifically that criticism of the commercial conduct of a merchandising corporation merits the protection of the actual malice test:

> In recent years, there has been an increase in consumer interest and awareness. Consumer reporting enables citizens to make better informed purchasing decisions. Whether particular statements made by consumer reporters are precisely accurate, it is necessary to insulate them from the vicissitudes of ordinary civil litigation in order to foster the First Amendment goals mentioned above. As the Supreme Court recognized in *New*

York Times, "would be critics . . . may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense having to do so." To the extent this occurs, consumers would be less informed, less able to make effective use of their purchasing power, and generally less satisfied in their choice of goods.

Application of the public figure rule to sellers such as Steaks, which through advertising solicit the public's attention and seek to influence consumer choice, therefore serves the values underlying the First Amendment by insulating consumer reporters and advocates from liability unless they have abused their positions by knowingly or recklessly publishing false information. [6 Med. L. Rep. 1129, 1141-42 (footnote omitted).]

In the case presently before this Court, the subject of the news reports was also misleading merchandising practices. The reports informed the public about the results of a Better Business Bureau investigation which had found exaggerated claims of savings and merchandise of inferior quality. However, the holding of the California Supreme Court was precisely the opposite of the Third Circuit's in the *Steaks Unlimited* case. Rather than holding that consumer reporting should be protected from the "vicissitudes of ordinary civil litigation", the California Supreme Court held that it was inherently unworthy of protection: "[c]riticism of commercial conduct does not merit the special protection of the actual malice test." Thus, a conflict exists on an important federal question, namely, whether criticism of commercial conduct is excluded by virtue of its subject matter from the protection afforded speech by the actual malice standard of *New York Times Co. v. Sullivan.*

3. Conclusion

Steaks Unlimited, Inc. v. Deaner cannot be reconciled with the holding of the California Supreme Court in the present case. Both were defamation actions arising out of criticism of deceptive merchandising practices. The Third Circuit specifically recognized the importance of criticism of commercial conduct and held that defendants were entitled to the protection of the actual malice standard. The California Supreme Court held that defendants were not entitled to the standard's protection on the rationale that consumer reporting is unworthy of protection.

An important federal question is involved and this Court can resolve the conflict by reviewing this case on a writ of certiorari.

Dated: June 27, 1980

Respectfully submitted,

ROBERT FREMLIN
Attorney for
Petitioners

LILLICK MCHOSE &
CHARLES
ROBERT KAVANAUGH
Of Counsel
TOLPEGIN, IMAI &
TADLOCK
ANDRE V. TOLPEGIN
Of Counsel